

² The Board notes that, following the May 26, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

(2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 18, 2015 appellant, then a 47-year-old sales and services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on December 12, 2015 she strained her abdomen when lifting a package while in the performance of duty. OWCP accepted the claim for a ventral hernia without obstruction or gangrene. On August 15, 2016 appellant underwent an OWCP-authorized ventral hernia repair. OWCP paid her wage-loss compensation on the supplemental rolls for time lost from work for the period August 13 through October 21, 2016. Appellant returned to modified light-duty employment on October 17, 2016 and to her date-of-injury employment on November 7, 2016.

In an impairment evaluation dated November 23, 2020, Dr. Blair Andrew Rhode, a Board-certified orthopedic surgeon, discussed appellant's history of sustaining a ventral hernia lifting a package at work on December 12, 2015. He noted that the hernia had been surgically repaired and that she had returned to her regular work duties. On examination, Dr. Rhode found tenderness along the midline of the abdomen with no evidence of a recurrent hernia. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ he found class 1 impairment of the abdomen using Table 6-4 on page 107, relevant to determining impairments of the digestive tract, which yielded a default whole person impairment of five percent. Dr. Rhode applied grade modifiers of zero for functional history, physical examination, and clinical studies, and found a total of five percent whole person impairment.

On February 3, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated February 3, 2021, OWCP requested that appellant submit an impairment evaluation addressing whether she had obtained maximum medical improvement (MMI) and providing an impairment rating in accordance with the A.M.A., *Guides*.

On March 18, 2021 Dr. David I. Krohn, a Board-certified internist serving as a district medical adviser (DMA), noted that Dr. Rhode had not described any current symptoms or attributed the tenderness to palpation along the midline to the surgical incision. Utilizing Table 6-10 on page 122 of the A.M.A., *Guides*, relevant to determining impairment due to abdominal herniation, he found class 0 impairment based on physical findings showing "no palpable defect in supporting structures of the abdominal wall and no description of slight protrusion at the site of defect with increased abdominal pressure." Dr. Krohn advised that Dr. Rhode had used Table 6-4, which was relevant to impairment of the upper digestive tract, instead of Table 6-10, the appropriate method set forth in the A.M.A., *Guides* for calculating impairment due to herniations. He found that appellant had reached MMI on December 15, 2020.

³ A.M.A., *Guides* (6th ed. 2008).

On March 22, 2021 OWCP requested that Dr. Rhode review and discuss Dr. Krohn's March 14, 2021 report. It afforded him 30 days to submit the requested information. No response was received.

By decision dated April 23, 2021, OWCP denied appellant's schedule award claim. It found that Dr. Krohn's report constituted the weight of the evidence and established that she had no permanent impairment.

On May 24, 2021 appellant requested reconsideration. She argued that Dr. Rhode had not responded to OWCP's March 22, 2021 letter requesting clarification of his report, as he had retired. Appellant asserted that she had recently attended an appointment at a new facility for an evaluation.

By decision dated May 26, 2021, OWCP denied appellant's request for reconsideration of the merits under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁸ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies

⁴ *Supra* note 1.

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.*, at Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

(GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.¹² FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.¹³ Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.¹⁴ The Secretary of Labor has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus, and tongue to the schedule.¹⁵

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In a November 23, 2020 impairment evaluation, Dr. Rhode found that appellant had tenderness along the abdominal midline with no evidence of a recurrent hernia. Utilizing Table 6-4 on page 107, which rates upper digestive tract impairment, he found that she had five percent whole person impairment. FECA, however, does not allow schedule awards for impairment of the body as a whole.¹⁷ Furthermore, a schedule award cannot be granted for a digestive impairment or hernia because neither are listed in FECA or the regulations as a scheduled member or function of the body.¹⁸ The terms of FECA are specific as to the method and amount of payment of

⁹ *Id.* at 494-531.

¹⁰ *Id.* 411.

¹¹ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹² *See G.S.*, Docket No. 17-1318 (issued October 11, 2017); *Leroy M. Terska*, 53 ECAB 247 (2001).

¹³ 5 U.S.C. § 8107(c).

¹⁴ *Id.* at § 8122(c)(22).

¹⁵ 20 C.F.R. § 10.404; *Henry B. Floyd, III*, 52 ECAB 220 (2001).

¹⁶ *Supra* note 6 at Chapter 2.808.6(f) (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

¹⁷ *D.K.*, Docket No. 21-0303 (issued July 8, 2021); *S.M.*, Docket No. 14-1052 (issued September 4, 2014).

¹⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404; *see D.C.*, Docket No. 14-1618 (issued December 15, 2014).

compensation. Neither OWCP, nor the Board, has the authority to enlarge the terms of FECA or to make an award of benefits under terms other than those specified in the statute.¹⁹

On March 18, 2021 Dr. Krohn found that appellant had no impairment due to her hernia using Table 6-10 on page 122, which provides criteria for evaluating whole person impairment due to abdominal herniation. As discussed, however, a hernia is not listed in FECA or the regulations as a scheduled member or function of the body, and thus there is no basis for awarding a schedule award for a hernia.²⁰

As the medical evidence of record is insufficient to establish permanent impairment of a member or function of the body listed in FECA or its implementing regulations, the Board finds that appellant has not met her burden of proof.²¹

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.²²

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²³

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁴ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁵ If the request is timely, but fails to meet at least one

¹⁹ *G.S.*, *supra* note 12; *S.K.*, Docket No. 08-848 (issued January 26, 2009).

²⁰ *Supra* note 18.

²¹ *G.S.*, *supra* note 12.

²² 5 U.S.C. § 8128(a).

²³ 20 C.F.R. § 10.606(b)(3); *see also S.S.*, Docket No. 18-0647 (issued October 15, 2018).

²⁴ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. *Supra* note 6 at Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²⁵ *Id.* at § 10.608(a); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Initially, the Board finds that OWCP properly considered appellant's representative's correspondence as a request for reconsideration and not as a claim for a schedule award.²⁷ The underlying issue on reconsideration is whether the medical evidence demonstrates a permanent impairment of a scheduled member or function warranting a schedule award. Thus, the Board must determine whether appellant presented sufficient evidence or argument demonstrating permanent impairment sufficient to warrant a merit review pursuant to 5 U.S.C. § 8128(a).²⁸

Appellant has not submitted evidence or raised an argument in support of her request for reconsideration sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(3). She did not show that OWCP erroneously applied or interpreted a specific point of law or raise a relevant legal argument not previously considered. On reconsideration, appellant asserted that Dr. Rhode had retired and that she had sought an impairment evaluation from another physician. Her contention, however, is not relevant to the underlying issue of whether she sustained a permanent impairment causally related to her accepted employment injury.²⁹ That is a medical issue which must be addressed by relevant and pertinent medical evidence.³⁰ Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).³¹

The Board further finds that appellant did not submit any relevant or pertinent new evidence not previously considered. As she did not provide relevant and pertinent new evidence, appellant is not entitled to a merit review based on the third requirement under section 10.606(b)(3).³²

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.³³

²⁶ *Id.* at § 10.608(b); *K.S.*, Docket No. 18-1022 (issued October 24, 2018).

²⁷ *See K.W.*, Docket No. 19-0553 (issued November 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

²⁸ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

²⁹ *See A.G.*, Docket No. 20-0290 (issued June 24, 2020).

³⁰ *See T.V.*, Docket No. 19-1504 (issued January 23, 2020); *S.P.*, Docket No. 18-1419 (issued February 27, 2019).

³¹ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

³² *Id.* at § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

³³ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 26, 2021 and April 23, 2021 are affirmed.

Issued: March 14, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board